TAN EWE HUAT

v.

PP

FEDERAL COURT, KUALA LUMPUR
ABDUL MALEK AHMAD FCJ
MOHD NOOR AHMAD FCJ
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: 05-40-2001(B)]
5 JANUARY 2004

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Heroin 86.47 grams - Appeal against conviction and death sentence - Whether appellant had possession of drugs - Whether appellant's claim that he made incriminating admissions to save co-accused should be taken into consideration - Whether appellant was induced to make cautioned statement - Whether caution administered to appellant was proper*

The appellant herein was convicted and sentenced to death under s. 39(B)(2) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in dangerous drugs (86.47 grams of heroin) under s. 39B(1)(a) of the Act. His appeal to the Court of Appeal was dismissed and that led to his appeal before the Federal Court.

The issues were: (1) whether the appellant was in exclusive custody, control or actual possession of the drugs as access to the house the drugs were found in were obtained by the use of keys seized from a co-accused; (2) whether the appellant's incriminating admissions in his cautioned statement ('CS') which he claimed to have been made in order to save the co-accused should be taken into consideration; (3) whether the appellant had been induced to make the CS; (4) whether the caution administered to the appellant was not proper in view of the words 'will be taken as evidence' instead of 'may be given in evidence' spoken by the recording officer ('PW6') in the Hokkien dialect; and (5) whether the evidence in the CS of the appellant's conduct on a previous occasion depicting that the appellant's possession of the drugs was not accidental was admissible.

Held:
Per Mohd Noor Ahmad FCJ

[1] The evidence revealed four pertinent factors. Firstly, the appellant had no exclusive custody, control or actual possession of the drugs because access to the house and the drugs were obtained by the use of the keys from the co-accused. Secondly, the appellant claimed that he fabricated the

incriminating admissions in the CS in order to save the co-accused. Thirdly, PW6 was not really proficient in the Hokkien dialect as the word 'akan' used in the cautioned statement meant 'will' in English and not 'boleh' in Bahasa Malaysia. That being the case, the caution administered was not really meaningful and the absence of inducement could not be completely ruled out. Fourthly, the evidence in the CS of the appellant's conduct in a previous occasion was weakened by the fact that the appellant had no exclusive custody or control of the drugs and that the admissions made by the appellant in the CS itself were being challenged. (pp 529 f-h & 530 a)

[2] There is no burden on an accused to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on the accused to raise a reasonable doubt as to the voluntariness of a CS. The only burden on the accused is to show suspicious circumstances surrounding the making of, or recording of, the CS. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible. (p 530 c)

[3] The combined effect of the four pertinent factors revealed in evidence had given rise to a reasonable suspicion as to the voluntariness of the statement, in particular, with regard to the second factor where the appellant claimed that he fabricated the incriminating admissions for the benefit of the co-accused. The trial judge did not consider whether the voluntariness of the incriminating admissions in the CS was destroyed or not by the fact that the appellant made the said admissions in the hope that someone close to him might benefit thereby. The fact that the co-accused was also charged subsequently was immaterial. What was pertinent was the circumstances prevailing at the time of the making of the CS. (pp 530 e-h & 531 a)

[4] The trial judge was not concerned with the voluntariness of the CS. He was only concerned with the fact that he did not believe that the appellant fabricated the incriminating admissions in the CS in order to save the co-accused. Thus, there was a non-direction on the part of the trial judge and that led to a misdirection. Further, the trial judge failed to adequately direct his mind as to the truth of the contents of the CS. In the circumstances, as the conviction was based mainly on the CS and the offence involved capital punishment, this court was not prepared to run the risk of sending the wrong person to the gallows. (p 531 a-c & g)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu di sini telah disabitkan dengan kesalahan mengedar dadah berbahaya (86.47 gram heroin) di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan telah dihukum mati di bawah s. 39B(2) Akta. Rayuannya ke Mahkamah Rayuan telah ditolak sekaligus menyebabkan rayuannya ke Mahkamah Persekutuan.

Isu-isunya adalah: (1) sama ada perayu mempunyai jagaan, kawalan ekslusif atau milikan sebenar dadah berdasarkan fakta bahawa laluan ke rumah di mana dadah tersebut berada dilakukan dengan mengguna kunci yang dirampas dari rakan sepertuduh perayu; (2) sama ada kenyataan beramaran ('CS') perayu yang menunjukkan kebersalahannya yang dikatakan perayu sebagai dibuat untuk menyelamatkan rakan sepertuduhnya boleh diberi sebarang pertimbangan; (3) sama ada perayu telah didorong untuk membuat CS; (4) sama ada amaran yang diberikan tidak teratur kerana perkataan dalam loghat Hokkien yang dituturkan oleh pegawai perakam ('PW6') adalah 'akan diterima sebagai keterangan' dan bukannya 'mungkin diterima sebagai keterangan'; dan (5) sama ada keterangan dalam CS berkaitan kelakuan terdahulu perayu yang menunjukkan pemilikan dadah oleh perayu bukan suatu kebetulan boleh diterima masuk.

Diputuskan:
Oleh Mohd Noor Ahmad HMP

[1] Keterangan memperlihatkan empat faktor yang berhubungan. Pertama, perayu tiada jagaan, kawalan atau milikan ekslusif dadah oleh kerana laluan kepada rumah dan dadah dibuat dengan menggunakan kunci yang diperoleh dari rakan sepertuduh perayu. Kedua, perayu mengatakan bahawa beliau telah mereka pengakuan yang menyalahkan dirinya dalam CS untuk menyelamatkan rakan sepertuduh. Ketiga, PW6 tidak benar-benar mahir dengan loghat Hokkien di mana perkataan 'akan' yang digunakan dalam pernyataan beramaran bermakna 'will' di dalam Bahasa Inggeris dan bukannya 'boleh' dalam Bahasa Malaysia. Dengan kes yang sedemikian, amaran yang diberi tidak benar-benar bermakna dan ketidakwujudan dorongan tidak boleh diketepikan sama sekali. Keempat, keterangan dalam CS berkaitan kelakuan terdahulu perayu telah dilemahkan oleh fakta bahawa perayu tiada jagaan atau kawalan atas dadah dan bahawa pengakuan yang dibuat perayu dalam CS telah juga dicabar.

[2] Tiada beban di pihak perayu untuk membuktikan bahawa pernyataan yang direkodkan darinya diberi tanpa kerelaan. Beban terletak atas pendakwa bagi membuktikan bahawa pernyataan diberi dengan sukarela. Juga tiada beban atas tertuduh untuk membangkitkan keraguan munasabah berkaitan kesukarelaan CS. Beban atas tertuduh hanyalah untuk menunjukkan wujud

keadaan syakwasangka mengenai pembuatan atau pemerekodan CS. Sebaik suatu syakwasangka yang munasabah wujud mengenai kesukarelaaan pernyataan, mahkamah berkewajipan untuk tidak menerimanya.

[3] Keempat-empat faktor yang berhubungan secara kombinasi telah membangkitkan syakwasangka yang munasabah mengenai kesukarelaan pernyataan, terutama mengenai faktor kedua di mana perayu mengatakan bahawa ia telah mereka pengakuan yang menunjukkan kebersalahannya bagi menyelamatkan rakan sepertuduh. Hakim bicara tidak menimbang sama ada kesukarelaan pengakuan tersebut dalam CS telah dihapuskan oleh fakta bahawa perayu membuat pengakuan itu dengan harapan seorang yang rapat dengannya akan memperoleh manfaat darinya. Fakta bahawa rakan sepertuduh juga telah didakwa kemudiannya adalah tidak material. Apa yang penting adalah halkeadaan yang wujud ketika CS dibuat.

[4] Hakim bicara tidak peka dengan kesukarelaan CS. Beliau hanya peka kepada fakta bahawa beliau tidak percaya bahawa perayu telah mereka pengakuan yang menunjukkan kebersalahannya dalam CS dengan tujuan untuk menyelamatkan rakan sepertuduh. Oleh itu terdapat ketiadaan-arahan di pihak hakim bicara yang menjurus kepada satu salah arahan. Hakim bicara juga tidak mengambil perhatian yang secukupnya terhadap soal kebenaran kandungan CS. Dengan yang demikian, oleh kerana sabitan adalah sebahagian besarnya diasaskan kepada CS dan kesalahan melibatkan hukuman mati, mahkamah tidak bersedia untuk mengambil risiko menghantar orang yang salah ke tali gantung.

Rayuan dibenarkan.]

Case(s) referred to:
Chan Ming Cheng v. PP [2002] 4 CLJ 77 CA ***(refd)***
R v. Rennie [1982] 1 All ER 385 ***(refd)***
Wong Yew Ming v. PP [1990] 2 CLJ 946; [1990] 1 CLJ (Rep) 321 SC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A(1), (da), 39B(1)(a), (2)
Evidence Act 1950, s. 15

Other source(s) referred to:
Sarkar on Evidence, 1999, 15th edn, p 458

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Anselm Fernandis DPP

[Appeal from Court of Appeal, Criminal Appeal No: B-05-77-1995]

Reported by Usha Thiagarajah

JUDGMENT

Mohd Noor Ahmad FCJ:

The appellant was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) together with another co-accused, his female companion. The charge stated that the accused on 13 September 1990 at about 1.45am at house No. 1, Jalan Taman Melur, Ampang, Hulu Langat, Selangor did traffic in dangerous drugs, to wit, heroin weighing 86.47 grams in contravention of the said section of the Act and punishable under s. 39B(2) of the Act. At the close of the prosecution case, the co-accused was acquitted and the appellant was called upon to enter his defence. At the conclusion of the trial, the appellant was convicted and sentenced to death. His appeal to the Court of Appeal was dismissed. On appeal to this court, we allowed his appeal, quashed the conviction and set aside the sentence. We now give our reasons.

Briefly, the case for the prosecution is this:

On 12 September 1990 at about 9.45pm a police surveillance team led by PW4 at Jalan Pandan 1, Ampang saw the appellant approaching the area of the surveillance. When approached by PW4 and his team, the appellant ran away. He was apprehended and arrested after a chase. Subsequently, he led the police party to a car. In the car sitting in the front passenger seat was the co-accused, who was also arrested. A bunch of seven keys was seized from the co-accused. Both the appellant and the co-accused were brought back to the office of PW4 at Jalan Hang Tuah. On 13 September 1990 at about 1.45am. PW4 and his team proceeded to a double-storey link house as described in the charge. The appellant and the co-accused were brought along. They entered the house by using the keys from the bunch of keys which was seized from the co-accused. PW4 then opened the door of the back room on the first floor with one of the keys from the same bunch of keys and entered the room. Inside the room, PW4 opened a cupboard by using one of the keys from the same bunch of keys. At the bottom of the cupboard he found three bags and a box. The three bags contained the drugs, which is the subject-matter of the charge. The box contained a weighing machine. In the same room, PW4 found the international passports of the appellant and the co-accused in a bag. In the room he also found, *inter alia*, the lease agreement for the house describing the appellant as the tenant and rental receipts in his name. On 15 September 1990, the appellant gave a cautioned statement to the recording officer (PW6) under s. 37A of the Act. The cautioned statement was challenged as being inadmissible but was admitted in evidence after a trial within a trial. In the cautioned statement, the appellant admitted that the police had examined his room and the police found the drugs and the weighing machine in the cupboard which he had kept under lock and key. He also admitted having previously sold part of the drugs from

the lot. Further, he admitted that he and the co-accused stayed together in the room. However, he stated that the co-accused had no knowledge of the drugs found in the room and that she was not at all involved with the drugs.

In his defence, the appellant deposed that he had fabricated the incriminating admissions in the cautioned statement as he wished to protect the co-accused and that the drugs were not his, that the room where the drugs were found was not his, that the room belonged to a male friend, that he was merely making use of that room, and that the house was occupied by five or six persons.

It is manifestly evident that the conviction of the appellant was based mainly on the cautioned statement. The main ground of the appeal before the Court of Appeal relates to the challenge on the admissibility of the cautioned statement and the reliance placed on it by the learned trial judge. At the trial within the trial, the first challenge was that PW6 had not explained to the appellant what the word "inducement" meant; and in this respect PW6 should have questioned the appellant further when the appellant told him that the co-accused was not involved. On the word "inducement" in Hokkein dialect PW6 deposed in cross-examination that he used:

> Adakah sesiapa mengajar kamu untuk bercakap? Adakah sesiapa yang menyuruh atau meminta kamu bercakap? Pada saya, perkataan-perkataan ini boleh dikatakan mendorong. Itulah fahaman saya 'inducement'. Saya setuju dalam Bahasa Inggeris 'inducement' melebihi dari apa yang saya tanya.
>
> Saya juga tanya sama ada sesiapa yang memaksa. Saya juga tanya sama ada sesiapa yang membuat janji.
>
> **Translation:**
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> Did anyone coach you in making the statement? Did anyone ask or request you to make the statement? To me, these words can be said to mean inducement. That is my understanding of 'inducement'. I agree that in English 'inducement' means more than what I asked.
>
> I also asked whether anyone had forced him. I also asked whether anyone made any promise.

And in reexamination, PW6 testified:

> Perkataan 'siah lu' pada fahaman saya ialah seorang disuruh membuat sesuatu dengan umpanan. Saya tidak ingat sama ada saya gunakan perkataan ini kepada OKT1.
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> (See page 77 Rekod Rayuan Jilid II).

Translation:

What I understand the word 'siah lu' is someone is asked to do something in return for a promise. I cannot remember whether I said this word to OKT1.

The second challenge was that the caution administered was not complete and the proper form as prescribed by proviso (b) to s. 37A(1) of the Act was not used because PW6 instead of telling the appellant that any statement "may be given in evidence" had told him that the statement "will be taken as evidence". On this point, PW6 deposed in cross-examination:

Soal : Saya cadangkan bahawa di dalam 'statutory caution' perkataan yang digunakan ialah 'boleh diberikan sebagai keterangan'.

Jawab : Saya setuju. Dalam percakapan amaran, perkataan yang digunakan ialah 'akan diambil sebagai keterangan'. Perkataan itu tidak mengikut Akta. Ada perbezaan luas.

(See p. 74 Rekod Rayuan Jilid II).

Soal : Perkataaan 'akan' dalam Hokkien apa terjemahannya?

Jawab : Saya tidak tahu perkataan sebenar perkataan 'akan' dalam Bahasa Hokkien.

(See p. 78 Rekod Rayuan Jilid II).

Translation :

Question : I put it to you that in the statutory caution the words used are 'may be given in evidence'.

Answer : I agree. In the cautioned statement the words used are 'will be taken as evidence'. These words are not in accordance with the Act. There is a vast difference.

Question : What is the translation in Hokkien for the word 'will'?

Answer : I do not know the actual word in Hokkein for the word 'will'.

However, when re-examined, PW6 attempted to correct his version on this issue, when he deposed:

Soalan : Apakah perkataan yang sebenar digunakan sebagai menterjemah bahagian akhir amaran?

Jawab : Boleh digunakan sebagai keterangan.

(See p. 78 Rekod Rayuan Jilid II).

Translation:

Question : What are the actual words used to translate the last part of the caution?

Answer : May be given in evidence.

To our mind, the attempt failed because written words speak louder than spoken words. It is evident from the written caution at p. 204 Rekod Rayuan Jilid II, line 11 that the word "akan" was used which means "will" in English and not "boleh" in Bahasa Malaysia.

The learned trial judge rejected the challenge. And the Court of Appeal agreed with him. The Court of Appeal stated:

> It will be noted that the Trial Judge rejected the challenge. We agree that was rightly done. Of importance is whether there was any hint of compulsion in the caution administered on the Appellant to give a statement. There was none. In fact it was clear the caution administered to him showed that he was not required to make a statement but that if he did, it will be used in evidence. It is not necessary to use the prescribed words of the statutory caution; it would be sufficient if the words used are of like effect on the accused: *Din bin Yahya v. PP* [1992] 1 MLJ 143. The recording officer here, had instead of using the exact words of the statutory caution, unwittingly provided him with a clearer option for him not to give the statement but the Appellant opted to give the cautioned statement. There is no principle of justice that has been injured by the choice of words that the recording officer used when he administered the caution. We would like to note that in coming to our conclusion we also considered the Court of Appeal (FM) case of *Poon Heong v. PP* [1949] 15 MLJ 114.
>
> We now come to the matter of the argument that the Appellant was not properly explained as to what inducement means and that when the Appellant stated that his girl friend was innocent the recording officer did not probe further why he made the statement. It will be noted that neither in the trial within the trial nor in the main trial was it ever remotely suggested by the Appellant that he was promised by someone in authority if he made the cautioned statement the girl would be released or that she would not be prosecuted nor was it ever suggested by the Appellant that he was in any way prevailed upon by someone in authority to make the cautioned statement.
>
> The Trial Judge had made a finding that the recording officer had properly explained what the meaning of inducement is to the Appellant – and it is a valid finding of fact with which we agree.

The defence did not identify the nature of the inducement nor the person who induced the Appellant to make the statement. The legal burden is always on the prosecution to prove voluntariness beyond all reasonable doubt and it is not for the defence to prove involuntariness (see *Ibrahim v. R* [1914] AC 599) and that the prosecution does that by adducing positive evidence to prove that it was made voluntarily. The prosecution, however, will not be able to go beyond that on specific issues unless the defence challenges the admissibility on the ground that the caution was not properly administered with specific details as to what went amiss or challenges the voluntariness and admissibility of the statement on the basis that there was a threat, promise, inducement or oppression not in general and vague terms but in terms enough to identify the nature of the threat, promise, inducement or oppression and the person in authority who inspired it: to ask for something less would be to impose an unfair burden on the prosecution.

Before us, several issues were canvassed by learned counsel for the appellant. They are on the identity of the drugs, the adminisibility of the cautioned statement, the presumption of trafficking under s. 37(da) of the Act having regard to the fact that the appellant was not found in the actual possession of the drugs and on the inclusion of the evidence of bad character of the appellant in the cautioned statement. We found no merit in respect of the issue on the identity of the drugs because the Chemist (PW1) confirmed the description of the heroin examined and he was not cross-examined on the issue and there was no break in the chain of evidence led. However, with regard to the other issues, they rotate on the question of whether the cautioned statement was voluntarily given.

The evidence reveals four pertinent factors. Firstly, the appellant had no exclusive custody or control or actual possession of the drugs because access to the house and the drugs were obtained by the use of the keys from the bunch of keys seized from the co-accused. Secondly, the appellant claimed that he fabricated the incriminating admissions in the cautioned statement in order to save the co-accused. Thirdly, PW6 was not really proficient in the Hokkien dialect as evident from what he deposed as aforesaid in relation to the word 'inducement' and the word 'will'. That being the case, the caution administered was not really meaningful and the absence of inducement could not be completely ruled out. And lastly, the cautioned statement contains evidence of the conduct of the appellant on a previous occasion where he had sold part of the drugs to one Raju and that whilst running away from the police party he had thrown away some of the drugs which were subsequently retrieved but was not made the subject-matter of the charge. There is no doubt that such evidence may be admissible under s. 15 of the Evidence Act 1950 to show knowledge or intention of the appellant and that possession of the drugs was not accidental. However, to our mind, the weight of that evidence is weakened by the fact

that firstly, the appellant had no exclusive custody or control or actual possession of the drugs, and secondly, the admissions were made by the appellant in the cautioned statement which was itself being challenged, unlike in the case of *Wong Yew Ming v. PP* [1990] 2 CLJ 946; [1990] 1 CLJ (Rep) 321 where the accused was found in possession of the drugs and witnesses were called to testify on the conduct of the accused on previous occasions.

It is trite law that there is no burden on an accused to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on the accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on the accused is to show suspicious circumstances surrounding the making of, or recording of, the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible. (See *Chan Ming Cheng v. Pendakwa Raya* [2002] 4 CLJ 77).

Since the conviction was based mainly on the cautioned statement where human life hangs in the balance, we are inclined to consider the four factors as a package and not by piecemeal approach as adopted by the learned trial judge and the Court of Appeal. To our mind, the combined effect of the aforesaid four factors has given rise to a reasonable suspicion as to the voluntariness of the statement, in particular, with regard to the second factor where the appellant claimed that he fabricated the incriminating admissions for the benefit of the co-accused. The Court of Appeal in *R v. Rennie* [1982] 1 All ER 385 CA held that where an accused confessed in the hope that he or someone close to him might benefit thereby, it is for the judge to decide in such a case whether the voluntariness of the confession was destroyed or not. The judge should understand the principle and spirit behind the requirement that if a statement by an accused is to be admissible in evidence against him, the prosecution must show it to be a voluntary statement in the sense that it was not obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, remembering that "voluntary" in ordinary parlance means "of one's own free will" (see *Sarkar On Evidence* 15th edn 1999 at p. 458). However, in the case at hand, upon a scrutiny of the judgment of the learned judge, we are satisfied that the learned judge did not at all consider whether the voluntariness of the incriminating admissions in the cautioned statement was destroyed or not by the fact that the appellant made the said admissions in the hope that someone close to him might benefit thereby. In our view, the learned judge ought to have considered that point even if it appears that there was absence of any hope of advantage held out by someone in authority. The fact that the co-accused was also charged subsequently is immaterial. What is

pertinent are the circumstances prevailing at the time of the making of the cautioned statement. The learned judge merely held that the cautioned statement was voluntarily given by the appellant because he was satisfied that the caution administered to the appellant was proper and the appellant understood the caution and there was no inducement when the cautioned statement was given. Although the learned judge did say that he did not accept the appellant's claim that the appellant fabricated the incriminating admissions in the cautioned statement in order to save the co-accused, that statement by the learned judge is only concerned with the fact that he did not believe the appellant that the incriminating admissions were fabricated rather than on the voluntariness of the cautioned statement. Therefore, there was non-direction on the part of the learned judge. The non-direction tantamount to a misdirection.

We are also satisfied that having regard to the aforesaid factors, the learned judge had failed to adequately direct his mind as to the truth of the contents of the cautioned statement, in particular the appellant's admission that he was a drug trafficker and that the drugs were found in his possession. Having admitted the cautioned statement, it was incumbent upon the learned judge to really consider on the truth or otherwise of its contents. The learned judge merely stated that he did not believe that the appellant fabricated the statements because the statements in the cautioned statement tallied with the evidence of the prosecution's witnesses and when cross-examined, the appellant admitted the truth of many matters in the cautioned statement. He also found no reason for the appellant to lie if, according to his defence, the room in which the drugs were found was occupied by another person and that he did not know that the drugs were kept in the cupboard. However, the learned judge did not specify the relevant evidence and the admissions and he did not demonstrate in what way they are material to the incriminating admissions in support of his disbelief. To our mind, the learned judge ought to have considered the evidence in greater depth with the aforesaid four factors in mind in order to determine the truth or otherwise of the incriminating admissions.

In view of our aforesaid conclusions, it is not necessary for us to consider the issue on the presumption of trafficking under s. 37(da) of the Act.

For the aforesaid reasons, as the conviction was based mainly on the cautioned statement and the offence involved capital punishment, we are not prepared to run the risk of sending the wrong person to the gallows. Hence, we decided as we did.